Supreme Court of the United States

OCTOBER TERM, 1943.

JOHN KLINGER, alias JACOB KLINGER,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

The opinion rendered by the United States Circuit Court of Appeals, Second Circuit, will be found annexed to the transcript of the record.

No opinion was rendered by the United States District Court, for the Southern District of New York.

Jurisdiction.

The statutory provision under which the jurisdiction of this court is invoked is Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 and the Act of June 7, 1934.

Statement of the Case.

Statement of the case is set forth in the petition.

Specifications of Errors to Be Urged.

It is respectfully submitted that the Circuit Court of Appeals misinterpreted the express wording of the decision of this court in the case of *Johnson* v. *U. S.*, 87 L. ed. 496 (Adv. Sheets No. 9), by sanctioning the United States Attorney to ask a defendant on trial whether he had refused to answer questions before the grand jury on the ground that to answer might incriminate him, and seeking to limit the *Johnson* case, *supra,* only to a case where a defendant asserted his privilege at the trial.

ARGUMENT.

POINT I.

The decision in the case of Johnson v. United States is controlling here.

In the *Johnson* case, the court stated at page 500:

> "But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (*Wilson* v. *United States,* 149 U. S. 60) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.

> The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' *Phelin* v. *Kenderdine,* 20 Pa. 354, 363; *Wireman* v. *Com.,* 203 Ky. 62-63."

This is exactly the situation in the case at bar. The defendant appeared before the grand jury, involuntarily, and there claimed his privilege.

The Circuit Court of Appeals, in its opinion, referring to petitioner's refusal to answer questions before the grand jury, stated:

> "* * * Some of the questions put to him he answered; some he refused to answer claiming his privilege against self-incrimination, in which he was undoubtedly right."

It thus appears that the petitioner rightly claimed his privilege against self-incrimination.

There is no substance to the limitation made by the Circuit Court of Appeals that the *Johnson* case should apply only to those cases where the claim of privilege is made and sustained during the course of a trial, and even then, only when the Judge has erroneously sustained the privilege. A defendant has the right to be protected from a disclosure to the trial jury of his claim of privilege against self-incrimination, regardless of whether the claim was made before a grand jury or on the trial. In either instance, the claim of privilege is no part of the trial.

If the limitation of the *Johnson* case, as ruled by the Circuit Court of Appeals, is approved, then there would be nothing to prevent a United States Attorney in every criminal case from bringing a defendant before a grand jury and either forcing a confession from him or compelling him to state that he refused to answer questions

on the ground that such answers might incriminate him. A defendant would then have little chance of obtaining a fair trial if he sought to testify in his own behalf and was confronted with his claim of privilege made before the grand jury. Under such circumstances, a defendant could never testify in his own behalf upon the trial. As was further stated by the Supreme Court in the *Johnson* case, at page 502:

> "When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

POINT II.

Constitutional rights may not be violated by indirect methods.

Counsel further respectfully submits that the ruling made by the Circuit Court of Appeals in the case at bar, if allowed to stand, would permit a United States Attorney to use a defendant's claim of privilege against him, should he become a witness on his own behalf, by the simple expedient of compelling the defendant to appear before a grand jury and questioning him concerning the offense. This would have the effect of permitting the jury to hear evidence, by indirect use of methods, which is forbidden.

Nardone v. *United States*, 308 U. S. 338, wherein the court states at page 340:

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect

use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' "

POINT III.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for writ of certiorari should be granted.

Respectfully submitted,

LOUIS HALLE,
Attorney for Petitioner.